Majlis Perubatan Malaysia & Anor v Asia Pacific Higher Learning Sdn Bhd (registered owner and licence holder of the private institute of higher learning under the name of Lincoln University College)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(NCVC)(W)-23–01 OF 2019
NOR BEE ARIFFIN, LEE HENG CHEONG AND MARIANA YAHYA JJCA
23 AUGUST 2022

Tort — Misfeasance in public office — Breach of duty — Respondent claimed there was breach by appellant in processing and conducting evaluation of medical degree programme — Whether appellants were public officers — Whether there was misfeasance in public office

Tort — Negligence — Breach of statutory duty — Respondent claimed there was breach by appellant in processing and conducting evaluation of medical degree programme — Whether there was breach of duty — Whether first appellant vicariously liable for action of second appellant — Whether elements of negligence had been proven against appellants

The respondent ('plaintiff') owned and managed Lincoln University College pursuant to a license granted under the Private Higher Educational Institutions Act 1996. The first appellant ('first defendant') was a statutory body created under the Medical Act 1971 ('Act 50') and regulated medical profession in Malaysia. The first defendant was also responsible for the recognition of medical degrees awarded by local and foreign universities and the registration of medical practitioners. The plaintiff's claims against the appellants ('defendants') for negligence, breach of statutory duty and misfeasance in public office were based on the breaches of the Guidelines of the Accreditation of Malaysian Undergraduate Medical Educational Programmes ('Accreditation Guidelines'), the provisions of the Malaysian Qualifications Agency Act 2007 ('Act 679') and Act 50 in the process and conduct of evaluation of its local medical degree programme ('MQA/PA 0927') and two of its offshore medical degree programmes ('MQA/PA 1561' and 'MQA/PA 1562'). The plaintiff's claims centred around two survey visits, undertaken by a panel appointed by a body known as Joint Technical Committee ('JTC') ('the first survey panel visit' and 'the second survey panel visit'). On both occasions, the survey panel were chaired by the second defendant who was a member of the first appellant. In respect of the first survey panel visit, the breaches alleged by the plaintiff, inter alia, were (a) failure to give the plaintiff the requisite four months' notice prior

to the visit; and (b) the second defendant required the plaintiff to procure the attendance of the lecturers for the MQA/PA 0927. Regarding the second survey panel visit, the breach alleged by the plaintiff was failure to evaluate MQA/PA 1561 and MQA/PA 1562. The plaintiff contended that MQA/PA 1561 and MQA/PA 1562 were converted into two local programmes whereas the defendants argued that these two programmes were absorbed into the local programme MQA/PA 0927. After a full trial of the action at the High Court, the learned judge found the defendants liable in all three causes of action against them and allowed the plaintiff's claim. Hence, this appeal.

Held, dismissing the appeal with costs:

(1) The Accreditation Guidelines had no force of law and there was no provision in Act 679 that made reference to the Accreditation Guidelines or to provide that any non-compliance with any guidelines that may be formulated thereunder, would constitute a breach under the Act. However, the Accreditation Guidelines were intended to be binding on both the first defendant and the plaintiff. The first defendant had issued and eventually adopted the Accreditation Guidelines for accreditation and the procedures to be followed in an application for accreditation but they were saying that they could choose to depart from it. The Accreditation Guidelines did not permit such an arbitrary exercise on the part of the first defendant when the provider of medical programme was required to adhere strictly to the Accreditation Guidelines. The first defendant could not disown its Accreditation Guidelines as non-binding. The guidelines was binding on the defendants as much as it bound the provider of medical programmes. Thus, the first defendant had a duty to comply with the Accreditation Guidelines for the purpose of the First and Second Survey Panel Visits (see paras 22–23, 28–29 & 34).

(2) The JTC needed to deliberate and make recommendations to the first defendant before the first defendant made a decision whether to approve or refuse accreditation. The first defendant however was not bound by the recommendations of the JTC. Be that as it may, it would be wrong in law for the first defendant to make a decision or approve or refuse accreditation without going through the JTC. The first defendant was the accrediting authority for the medical programmes, not the JTC or the Malaysian Qualifications Agency ('MQA'). In the circumstances, the defendants' contention that the plaintiff had sued the wrong parties was rejected (see paras 43, 50 & 53).

(3) The first defendant and its JTC must adhere to the criteria and procedures as set out in the Accreditation Guidelines as the guidelines set out the criteria and procedures to be followed in making the recommendations, the breach of which give rise to a right of recourse against the defendants by the plaintiff. The four months' notice as

stipulated in para (a) of Part 1 of the Accreditation Guidelines was applicable to all visits for the accreditation of a medical programme and thus the non-compliance of by the defendants had denied the plaintiff adequate time to prepare for the visits. Next, there was nothing in the Accreditation Guidelines which required new medical schools to make physically available teaching staff during post approval visit. The imposition of the requirement for lecturers to be present at the first visit was a breach of the duty of care owed by the second defendant to the plaintiff. Lastly, there was a clear breach by the second defendant in refusing to evaluate the MQA/PA 1561 and the MQA 1562. The reasons given by the defendants for the non-valuation were untenable (see paras 54, 73, 76, 80, 84, 99 & 104).

(4) The first defendant was vicariously liable for the acts attributed to the second defendant, as the second defendant was an agent of the first defendant when he conducted the survey panel visits. The second defendant was directly under the control of the first defendant in so far as it concerned the two visits and the negligence took place while the second defendant was conducting the visits as instructed by the first defendant. The learned judge correctly found that all the elements of negligence had been proven against the defendants (see paras 119–120).

(5) Apart from the breach of the Accreditation Guidelines, the first defendant was also in breach of its statutory duties under s 52 of Act 679. The first defendant could not make its decision as it did, based on the representation by the second defendant and not based on the recommendation by the JTC. There was no evidence to show that the decision made was premised on the recommendation by the JTC. The first defendant's act of endorsing the second defendant's re-designating the conversion of MQA/PA 1561 and MQA/PA 1562 into MQA/PA 0927 which eventually led to the non-evaluation of the MQA/PA 1561 and MQA/PA 1562 by reason of the refusal of the second defendant to conduct the same, and in the result there was no recommendation from the JTC for the first defendant to act upon in making a decision under s 52, was not in accordance with the law. The first defendant had exceeded its legal limits in effectively refusing to consider accreditation of the off shore programmes, without any recommendation from the JTC. In the circumstances, there was a clear breach of statutory duties by the defendants whereby their actions and/or omissions, the two offshore programmes were not evaluated (see paras 123 & 126–127).

(6) The members of the first defendant would be regarded as public officers for the purposes of the tort of misfeasance in public office. Sections 5 and 6 of Act 50 and ss 109 and 110 of Act 679 recognised the members of the first defendant as public servants/public officers in the discharge of their duties as members. The conduct of the first and second defendants

involved the exercise of power as a public officer or the exercise of public functions. The learned judge did not err in finding that there was targeted malice on the part of the second defendant in the conduct of the first and second survey panel visits as there was no credible explanation of a proper motive provided by the second defendant for his very actions. The defendants' denial of targeted malice must be rejected (see paras 137, 141 & 144).

(7) The plaintiff's contention of malice had been made out. The second defendant could not seek protection under s 110 of Act 679 and s 2 of Act 198 because he had not acted in good faith. In so far as it concerned the first defendant, s 5 of Act 50 provided that Act 198 shall apply to any action or suit against it or its members, officers, servants or agents. The first defendant could not rely on s 5 of Act 50 as the first defendant had exceeded its legal limits in making its decision (see para 153).

(8) The subject matter of the dispute were the defendants' breaches of the Accreditation Guidelines during the first and second survey panel visits and the dispute did not concern the refusal to grant or revocation of accreditation its medical programmes. Thus, the plaintiff was not required to resort to s 82 of Act 679 (see para 154).

[Bahasa Malaysia summary

Responden ('plaintif') memiliki dan menguruskan Kolej Universiti Lincoln menurut lesen yang diberikan di bawah Akta Institusi Pendidikan Tinggi Swasta 1996. Perayu pertama ('defendan pertama') ialah badan berkanun yang diwujudkan di bawah Akta Perubatan 1971 ('Akta 50') dan melaraskan profesion perubatan di Malaysia. Defendan pertama juga bertanggungjawab ke atas pengiktirafan ijazah perubatan yang dianugerahkan oleh universiti tempatan dan luar negara serta pendaftaran pengamal perubatan. Tuntutan plaintif terhadap perayu ('defendan') atas kecuaian, pelanggaran kewajipan statutori dan salah laku dalam jawatan awam adalah berdasarkan pelanggaran Panduan Pentauliahan Program Pengajian Perubatan Prasiswazah Malaysia ('Panduan Pentauliahan'), peruntukan Akta Agensi Kelayakan Malaysia 2007 ('Akta 679') dan Akta 50 dalam proses dan pengendalian penilaian program ijazah perubatan tempatan ('MQA/PA 0927') dan dua program ijazah perubatan luar negara ('MQA/PA 1561' dan 'MQA/PA 1562'). Tuntutan plaintif tertumpu kepada dua lawatan tinjauan, yang dilakukan oleh panel yang dilantik oleh badan yang dikenali sebagai Jawatankuasa Teknikal Bersama ('JTC') ('lawatan tinjauan pertama panel' dan 'lawatan tinjauan kedua panel'). Pada kedua-dua kejadian itu, panel tinjauan dipengerusikan oleh defendan kedua yang merupakan ahli perayu pertama. Berkenaan dengan lawatan tinjauan pertama panel, pelanggaran yang didakwa oleh plaintif, antara lain, adalah (a) kegagalan untuk memberi plaintif notis empat bulan yang diperlukan sebelum lawatan itu; dan (b) defendan kedua memerlukan plaintif mendapatkan kehadiran pensyarah untuk MQA/PA 0927. Berkenaan lawatan

A tinjauan kedua panel, pelanggaran yang didakwa oleh plaintif adalah kegagalan menilai MQA/PA 1561 dan MQA/PA 1562. Plaintif berhujah bahawa MQA/PA 1561 dan MQA/PA 1562 telah ditukar kepada dua program tempatan manakala defendan berhujah bahawa kedua-dua program ini telah diserap ke dalam program tempatan MQA/PA 0927. Selepas perbicaraan penuh tindakan itu di Mahkamah Tinggi, hakim yang bijaksana mendapati defendan bertanggungjawab dalam ketiga-tiga kausa tindakan terhadap mereka dan membenarkan tuntutan plaintif. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan dengan kos:

(1) Panduan Pentauliahan tidak mempunyai kuasa undang-undang dan tiada peruntukan dalam Akta 679 yang merujuk kepada Panduan Pentauliahan atau memperuntukkan bahawa sebarang ketidakpatuhan terhadap mana-mana panduan yang mungkin digubal di bawahnya, akan menjadi pelanggaran di bawah Akta. Walau bagaimanapun, Panduan Pentauliahan bertujuan untuk mengikat kedua-dua defendan pertama dan plaintif. Defendan pertama telah mengeluarkan dan akhirnya menerima pakai Panduan Pentauliahan untuk pentauliahan dan prosedur yang perlu diikuti dalam permohonan untuk pentauliahan tetapi mereka mengatakan bahawa mereka boleh memilih untuk meninggalkannya. Panduan Pentauliahan tidak membenarkan tindakan sewenang-wenangnya di pihak defendan pertama apabila penyedia program perubatan dikehendaki mematuhi Panduan Pentauliahan dengan ketat. Defendan pertama tidak boleh menafikan Panduan Pentauliahannya sebagai tidak mengikat. Panduan itu mengikat defendan sama seperti ia mengikat penyedia program perubatan. Oleh itu, defendan pertama mempunyai kewajipan untuk mematuhi Panduan Pentauliahan bagi tujuan lawatan tinjauan pertama dan kedua panel (lihat perenggan 22–23, 28–29 & 34).

(2) JTC perlu menimbang dan membuat cadangan kepada defendan pertama sebelum defendan pertama membuat keputusan sama ada untuk meluluskan atau menolak pentauliahan. Defendan pertama bagaimanapun tidak terikat dengan cadangan JTC. Walau apa pun, adalah salah di sisi undang-undang untuk defendan pertama membuat keputusan atau meluluskan atau menolak pentauliahan tanpa melalui JTC. Defendan pertama ialah pihak berkuasa pentauliahan untuk program perubatan, bukan JTC atau Agensi Kelayakan Malaysia ('MQA'). Dalam keadaan tersebut, dakwaan defendan bahawa plaintif telah menyaman pihak yang salah telah ditolak (lihat perenggan 43, 50 & 53).

(3) Defendan pertama dan JTCnya mesti mematuhi kriteria dan prosedur seperti yang dinyatakan dalam Panduan Pentauliahan kerana Panduan menetapkan kriteria dan prosedur yang perlu diikuti dalam membuat

cadangan, yang pelanggarannya menimbulkan hak untuk tindakan terhadap defendan oleh plaintif. Notis empat bulan seperti yang ditetapkan dalam perenggan (a) Bahagian 1 Panduan Pentauliahan adalah terpakai kepada semua lawatan untuk pentauliahan program perubatan dan dengan itu ketidakpatuhan oleh defendan telah menafikan plaintif masa yang mencukupi untuk bersedia untuk lawatan tersebut. Seterusnya, tiada apa-apa dalam Panduan Pentauliahan yang memerlukan sekolah perubatan baharu menyediakan tenaga pengajar secara fizikal semasa lawatan pasca kelulusan. Pengenaan keperluan pensyarah untuk hadir pada lawatan pertama adalah melanggar kewajipan berjaga-jaga yang terhutang oleh defendan kedua kepada plaintif. Akhir sekali, terdapat pelanggaran yang jelas oleh defendan kedua dalam keengganan menilai MQA/PA 1561 dan MQA 1562. Alasan yang diberikan oleh defendan untuk tidak menilai adalah tidak boleh dipertahankan (lihat perenggan 54, 73, 76, 80, 84 , 99 & 104).

(4) Defendan pertama bertanggungan secara vikarius bagi perbuatan yang dikaitkan dengan defendan kedua, kerana defendan kedua adalah ejen defendan pertama semasa beliau menjalankan lawatan tinjauan panel. Defendan kedua secara langsung di bawah kawalan defendan pertama setakat yang melibatkan dua lawatan itu dan kecuaian berlaku semasa defendan kedua menjalankan lawatan seperti yang diarahkan oleh defendan pertama. Hakim yang bijaksana dengan betul mendapati bahawa semua unsur kecuaian telah dibuktikan terhadap defendan (lihat perenggan 119–120).

(5) Selain daripada pelanggaran Panduan Pentauliahan, defendan pertama juga melanggar kewajipan statutorinya di bawah s 52 Akta 679. Defendan pertama tidak boleh membuat keputusannya seperti yang dibuatnya, berdasarkan perwakilan oleh defendan kedua dan bukan berdasarkan cadangan oleh JTC. Tiada bukti menunjukkan bahawa keputusan yang dibuat adalah berdasarkan cadangan JTC. Tindakan defendan pertama menyokong defendan kedua menetapkan semula penukaran MQA/PA 1561 dan MQA/PA 1562 kepada MQA/PA 0927 yang akhirnya membawa kepada ketiadaan penilaian MQA/PA 1561 dan MQA/PA 1562 dengan alasan daripada keengganan defendan kedua untuk melakukan perkara yang sama, dan akibatnya tiada cadangan daripada JTC untuk defendan pertama bertindak dalam membuat keputusan di bawah s 52, adalah tidak mengikut undang-undang. Defendan pertama telah melebihi had undang-undangnya dengan menolak untuk mempertimbangkan pentauliahan program luar negara, tanpa sebarang cadangan daripada JTC. Dalam keadaan tersebut, terdapat pelanggaran kewajipan statutori yang jelas oleh defendan di mana melalui tindakan dan/atau peninggalan mereka, kedua-dua program luar negara tidak dinilai (lihat perenggan 123 & 126–127).

(6) Ahli defendan pertama akan dianggap sebagai pegawai awam bagi maksud tort salah laku dalam jawatan awam. Seksyen 5 dan 6 Akta 50 dan ss 109 dan 110 Akta 679 mengiktiraf ahli defendan pertama sebagai penjawat awam/pegawai awam dalam menjalankan tugas mereka sebagai ahli. Kelakuan defendan pertama dan kedua melibatkan pelaksanaan kuasa sebagai pegawai awam atau menjalankan fungsi awam. Hakim yang bijaksana tidak terkhilaf apabila mendapati terdapat niat jahat di pihak defendan kedua dalam menjalankan lawatan tinjauan pertama dan kedua panel kerana tiada penjelasan yang boleh dipercayai mengenai motif yang betul yang diberikan oleh defendan kedua atas tindakannya itu. Penafian defendan terhadap niat jahat harus ditolak (lihat perenggan 137, 141 & 144).

(7) Pertikaian plaintif mengenai niat jahat telah dibuktikan. Defendan kedua tidak boleh mendapatkan perlindungan di bawah s 110 Akta 679 dan s 2 Akta 198 kerana beliau tidak bertindak dengan suci hati. Berkenaan defendan pertama, s 5 Akta 50 menyatakan Akta 198 hendaklah terpakai bagi sebarang tindakan atau saman terhadapnya atau anggota, pegawai, pekhidmat atau ejennya. Defendan pertama tidak boleh bergantung pada s 5 Akta 50 kerana defendan pertama telah melebihi had undang-undangnya dalam membuat keputusan (lihat perenggan 153).

(8) Perkara pokok pertikaian ialah pelanggaran Panduan Pentauliahan oleh defendan semasa lawatan tinjauan pertama dan kedua panel dan pertikaian itu tidak melibatkan penolakan untuk memberikan atau membatalkan pentauliahan program perubatannya. Oleh itu, plaintif tidak perlu menggunakan s 82 Akta 679 (lihat perenggan 154).]

Cases referred to

Asia Pacific Higher Learning Sdn Bhd v Majlis Perubatan Malaysia & Ors and another suit [2017] MLJU 1038; [2017] 1 LNS 1014, HC (refd)

Bahamas International Trust Co Ltd and another v Threadgold [1974] 3 All ER 881, HL (refd)

Bonnington Castings v Wardlaw [1956] AC 613, HL (refd)

Caparo Industries Plc v Dickman [1990] 2 AC 605, HL (refd)

DC Contractor Sdn Bhd v Universiti Pertahanan Nasional Malaysia [2014] 11 MLJ 633, HC (folld)

Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 281, FC (refd)

Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal [2018] 1 MLJ 685; [2017] 10 CLJ 529, FC (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor [2010] 4 MLJ 577, FC (refd)
NVJ Menon v The Great Eastern Life Assurance Co Ltd [2004] 3 MJ 38, CA (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 6 MLRA 193, FC (refd)
Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur v Poh Yang Hong [2016] 6 MLJ 413, FC (refd)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)
Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals [2019] 2 MLJ 553; [2019] 2 MLRA 591, FC (refd)
Selvakumar a/l Subramaniam v Penguasa Pusat Pemulihan Akhlak, Simpang Renggam, Johor Darul Takzim & Ors [2014] 7 MLJ 244; [2013] 1 LNS 1068, HC (refd)
Thong Foo Ching & Ors v Shigenori Ono [1998] 4 MLJ 585; [1998] 4 CLJ 674, CA (refd)
Three Rivers District Council and others v Bank of England (No 3) [2000] 3 All ER 1, HL (refd)
Tony Pua v Government of Malaysia [2019] 12 MLJ 1, FC (folld)
Tun Dr Mahathir Mohamad & Ors v Datuk Seri Mohd Najib Tun Haji Abdul Razak [2017] 9 MLJ 1, HC (refd)
UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363; [2010] 9 CLJ 785, FC (refd)
Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 2 MLJ 1, FC (refd)
X Minors v Bedfordshire County Council [1995] 2 AC 633, HL (refd)

Legislation referred to

Malaysian Qualifications Agency 2007 ss 50, 50(1), (2), (4), (6), 51, 52, 52(1), 52(1)(a), (2), (3), 53, 53(1), 54, 55, 55(1), (2), (3), (4), (5), 80, 82, 109, 110
Medical Act 1971 ss 3, 5, 6, 12(2), Second Schedule
Private Higher Educational Institutions Act 1996
Public Authorities Protection Act 1948 s 2

Appeal from: *Asia Pacific Higher Learning Sdn Bhd v Majlis Perubatan Malaysia & Anor* [2020] 7 MLJ 549 (High Court, Kuala Lumpur)

Mohd Hafarizam Harun (with Zulkefli Ahmad Makinuddin, Abu Bakar Isa Ramat, Nor Emelia bt Mohd Iszeham and Sareekha Roslyna bt Mohd Rosli) (Hafarizam Wan & Aisha Mubarak) for the appellants.
Steven Thiru (with Gerard Lourdesamy, Gregory Das, Jeremiah Rais, Leah Samuel

and Chinnapalani Devi Arumugam) (Gerard Samuel & Assoc) for the respondents.

Nor Bee Ariffin JCA:

INTRODUCTION

[1] The respondent owns and manages Lincoln University College ('LUC'), (formerly known as Lincoln College ('LC') pursuant to a license granted under the Private Higher Educational Institutions Act 1996 ('Act 555').

[2] The first appellant is a statutory body created under the Medical Act 1971 ('Act 50') and regulates medical profession in Malaysia. The first defendant is also responsible for the recognition of medical degrees awarded by local and foreign universities and the registration of medical practitioners.

[3] The respondent's claims against the appellants for negligence, breach of statutory duty and misfeasance in public office were based on the breaches of the Guidelines of the Accreditation of Malaysian Undergraduate Medical Education Programmes ('Accreditation Guidelines'), the provisions of the Malaysian Qualifications Agency 2007 ('Act 679') and Act 50 in the process and conduct of evaluation of its local medical degree programme ('MQA/PA 0927') and two of its offshore medical degree programmes ('MQA/PA 1561 and MQA/PA1562').

[4] The respondent's claims centred around two survey visits undertaken by a panel appointed by a body known as Joint Technical Committee for Accreditation ('JTC'). The two survey panel visits were conducted on 13 May 2011 and 14 May 2011 and 27 May 2011 ('first survey panel visits') and on 29 April 2013 and 30 April 2013 ('second survey panel visits').

[5] On both occasions, the survey panels were chaired by the second appellant who was a member of the first appellant at the material time.

[6] The parties have filed the statement of agreed facts as between them which we find o be comprehensive, covering the facts and events that had taken place in the dispute. We adopt the same and we do not think it is necessary to reproduced them.

PROCEEDINGS IN THE HIGH COURT

[7] The trial of the action in the High Court proceeded on the question of liability only. The learned judge ruled that the court would proceed to hear and determine issues relating to damages if liability was established.

[8] After a full trial of the action, the learned judge found the defendants liable in all three causes of action against them and allowed the plaintiff's claim. The learned judge directed that damages be assessed before him.

[9] The learned judge had, as apparent from his grounds of judgment ('GOJ'), undertaken an extensive analysis of the evidence presented before him in arriving at his decision in allowing all claims by the plaintiff for negligence, breach of statutory duty and misfeasance in public office which are assailed by the defendants in this appeal. The defendants presented 27 grounds in challenging the decision.

[10] The parties in this judgment are referred to as they were in the High Court.

DECISION OF THIS COURT APPELLATE INTERVENTION

[11] It is well settled law that an appellate court would be slow to disturb a trial court finding of facts unless the decision is shown to be plainly wrong (*Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; *Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor* [2010] 4 MLJ 577; *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785; *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453).

[12] The Federal Court recently restated the plainly wrong test for appellate intervention in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 6 MLRA 193. Zabariah Yusuf FCJ delivering the decision of the court held as follows:

> [148] ... As long as the trial judges conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.
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> ...
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> [151] It is not sufficient for the Court of Appeal to reverse the findings on fact merely because on a particular point of evidence, it disagreed with the conclusion

made by the trial court on whether one party or the other is to be believed on the evidence that they gave in court. Although there may be inconsistencies in the evidence which could mean that another judge would have been persuaded to reach a different conclusion, this is not relevant when considering if a trial judges findings of fact could be overturned.

[152] The Court of Appeal failed to undertake the appropriate review exercise and further failed to make the appropriate determination that the learned trial judge had gone plainly wrong in his decision, in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. Unless the conclusion that the learned trial judge drew from it was one that no reasonable judge would have made, his conclusion on the point should be left undisturbed premised on the *Henderson*, *Mc Graddie* and *Tengku Dato Ibrahim Petra Tengku Indra Petra* principles ...

THE ACCREDITATION GUIDELINES

[13] The learned judge had rightly described in general the registration and accreditation framework for medical practitioners involving the role and functions of the first defendant under Act 50 and Act 679, the role and functions of the Malaysian Qualifications Agency ('MQA') and the JTC and matters relating to the Accreditation Guidelines in paras 9–17 of the GOJ.

[14] As pointed out by the learned judge, Act 679 is silent on the procedures and does not prescribe any criteria to be applied by the first defendant for the purpose of accreditation.

[15] To this end, the first defendant has adopted the Accreditation Guidelines on 12 April 2011.

[16] Given the history on the formulation of the Accreditation Guidelines, as narrated by PW4 and as demonstrated in the Accreditation Guidelines itself, it is beyond doubt that the Accreditation Guidelines was to establish as well as to assess undergraduate medical education programmes in Malaysia. The aim of the Accreditation Guidelines as stated at para 3 of the document is explicit:

3. AIM OF DOCUMENT

The aim of this document is to provide the educational guidelines for standards in undergraduate medical education, to describe the procedures for carrying out accreditation and new course approval and to provide guidelines for making judgments and decisions about accreditation.

[17] It is beyond doubt that the Accreditation Guidelines provide guidance to the plaintiff as provider of medical programme, on how the first defendant exercises its powers under Act 679 to grant or to refuse accreditation of its local and offshore programmes.

[18] As the three heads of the plaintiff's claim are based on the breaches of the Accreditation Guidelines by the defendants in respect of the First and the second survey panel visits, it is appropriate to consider at the outset the status of the Accreditation Guidelines. Thus arises this question, does the Accreditation Guidelines have the force of law? A B

[19] The defendants submitted that the Accreditation Guidelines was merely to serve as guidelines to facilitate the accreditation process for medical programmes in Malaysia, and it was never meant to be strictly binding with the full force of law. Learned counsel contended that the Accreditation Guidelines do not possess the full force of law that a piece of legislation does, and cannot possibly impose a duty of obligation of any sort on the defendants. In this regard, reliance was placed on the Court of Appeal case of *Thong Foo Ching & Ors v Shigenori Ono* [1998] 4 MLJ 585; [1998] 4 CLJ 674. The defendants contended that as the Accreditation Guidelines do not have the force of law, any contravention thereof do not give rise to legal rights of the plaintiff. C D

[20] Learned counsel further submitted that the learned judge had made contradicting and erroneous findings when in paras 64–65 of the GOJ, he had made a finding that the Accreditation Guidelines did not have force of law but at the same time in para 68, held that any non-conformity would amount to a breach by the first defendant of its duty under s 52 of Act 679. E

[21] The judge's reasoning on the binding effect of the Accreditation Guidelines is probably misunderstood by the defendants. What the learned judge is saying in paras 64 and 65 is that the Accreditation Guidelines do not have the force of law because non-compliance thereof does not attract penal sanctions on any person that are affected by them. However, when the Accreditation Guidelines provide guidance to the prospective applicants on the manner in which the power and discretion that have been granted to the first defendant pursuant to s 52 of Act 679 will be exercised, then if it is established that the substantive provisions of the guidelines have not been adhered to by the first defendant, such an act would amount to a breach by the first defendant of its statutory duty to properly evaluate the recommendations of the JTC and to exercise its power and discretion in accordance with the law. F G H

[22] We accept, as did the learned judge, that the Accreditation Guidelines have no force of law and that there is no provision in Act 679 that make reference to the Accreditation Guidelines or to provide that any non-compliance with any guidelines that may be formulated thereunder, will constitute a breach under the Act. I

[23] We have carefully perused through the Accreditation Guidelines in out attempt to construe whether the guidelines are binding or otherwise, on both

A the first defendant and the plaintiff as the applicant. In our view, the Accreditation Guidelines are intended to be binding on both the first defendant and the plaintiff. Our reasons are as follows.

B **[24]** PW1 who was former president of the first defendant confirmed that the JTC of the first appellant is obliged to follow the Accreditation Guidelines. So did PW4, also a former president, who stated that the first defendant should not disregard the provisions of the Accreditation Guidelines when exercising its function as the professional body in the course of an accreditation exercise because those are the only Guidelines that are available and thus the first C defendant have to adhere to the Guidelines in order to start the accreditation process.

[25] We are mindful that when it comes to interpreting documents, it is a D question of law for the courts and not by the witnesses through their oral evidence (see *Bahamas International Trust Co Ltd and another v Threadgold* [1974] 3 All ER 881; *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38). However, a point to note in this case is that the first defendant had previously followed the Accreditation Guidelines. PW4 said E that the Accreditation Guidelines was the brainchild of the first defendant with the aim as we had alluded to earlier. The history of its formulation is telling.

[26] The significance of the Accreditation Guidelines cannot be underscored F as shown from the excerpts, stated in para 1 on 'Introduction', as reproduced below:

> The accreditation process assist medical schools in the attainment of standards of structures and functions as well as the performance of graduates in compliance with national norms of preparation for practice and further training. All doctors wishing G to be licensed for practice in Malaysia must graduate from an accredited school.
>
> This document provides operational guidelines for the assessment of individual medical schools against these criteria by means of a national or regional accreditation process. These guidelines are designed to be a template upon which countries establishing accreditation programs can develop their own versions, H irrespective of the state of development of their medical education system.
>
> In year 2000, the Director-General of Health suggested that the guidelines on criteria, standards and procedures for accreditation that were developed in 1998 be reviewed to align them with the WFME guidelines on International Standards. At an accreditation training workshop in Universiti Sains Malaysia from 24–28 I September 2000, the format of the guidelines was review and participants recommended that the format of the WFME standards with nine broad areas be adopted.

> An updated version of the guidelines was edited following a workshop in July 2006 to be in line with the standards required by the Malaysian Medical Council ('MMC') and Lembaga Akreditasi Negara (LAN, now known as Malaysian Qualifications Agency, MQA).

[27] Given the aforesaid, the introduction text itself without more, illustrate the intention that the accrediting authorities and the provider of medical programme will comply with the guidelines as it is 'guidelines for making judgments and decisions about accreditation' (see the Aim of Document).

[28] In the instant case, as held by the learned judge, the first defendant had issued and eventually adopted the Accreditation Guidelines for accreditation and the procedures to be followed in an application for accreditation. It is repugnant to common sense if in light of the objective to be attained in the formulation of the Accreditation Guidelines, the first defendant is now saying that the Accreditation Guidelines, which they have in mind to be a template for other countries as well, is not binding on them and not meant for their strict adherence. Put differently, they are saying that they can choose to depart from it.

[29] We are of the view that the Accreditation Guidelines do not permit such an arbitrary exercise on the part of the first defendant when the provider of medical programme is required to adhere strictly the Guidelines. In para 9 of the Accreditation Guidelines titled 'Non Compliance And Unsatisfactory Progress', the provider of medical programmes are forewarned in these words:

> Any school or programme which does not adhere strictly to any of these Guidelines shall be brought to task by the Technical Committee.

[30] It will be unfair to the provider of medical programme if the JTC, the first defendant and survey panel members can choose to ignore the Accreditation Guidelines. This indeed run counter to the objectives of formulating the Guidelines.

[31] The effect of a guideline was considered in *DC Contractor Sdn Bhd v Universiti Pertahanan Nasional Malaysia* [2014] 11 MLJ 633. Mary Lim J (as she then was) in this case considered the effect of *Surat Pekeliling Perbendaharaan Bil 8 Tahun 2009* in determining the validity of the first termination of the contract entered into between the plaintiff and the defendant. Her Ladyship disagreed with the defendant that the guidelines had no force or legal effect and that the first termination was valid by reason of the non-compliance of the guidelines. The learned judge held:

> [105] In this case, it is the court's finding that the guidelines known as Surat Pekeliling Perbendaharaan Bil 8 Tahun 2009 do have force and effect to the defendant. By 'force', it does not necessarily mean force of law; but application

effect and compliance. The details of this Surat Pekeliling Perbendaharaan (SPP 8/2009) can be found at pp 165–174 of bundle B. According to SPP 8/2009, its object is to:

> memaklumkan semua Kementerian, Jabatan dan Badan Berkanun (Agensi) mengenai peraturan dan kaedah pelantikan kontraktor bagi menyiapkan projek-projek sakit yang telah ditamatkan.

> [106] It appears from SPP 8/2009 issued by the Ministry of Finance that whole purpose of the guidelines is to prescribe certain procedures that must be followed before 'projek sakit' may be terminated and new contractors appointed to complete the works under the 'projek sakit'. Certain committees will have to be set up before such actions can be taken. In particular, a 'Laporan Projek Sakit' must be prepared using a prescribed format. It is upon the decision of the committee established under SPP 8/2009 that a termination can then be properly and validly taken.

[32] The decision of the High Court in the above case was affirmed by Court of Appeal (save for some variations regarding the percentage on the figures given by the court). We adopt the reasoning of the learned judge in *DC Contractor Sdn Bhd* as the correct statement of the law.

[33] In our judgment, the first defendant cannot disown its Accreditation Guidelines as non-binding. The guidelines is binding on the defendants as much as it binds the provider of medical programmes. As learned counsel for the plaintiff puts it, the defendants must not equate the force of law with legal consequences any non-compliance. Just like the *Surat Pekeliling Perbendaharaan Bil 8 Tahun 2009* in *DC Contractor Sdn Bhd*, the Accreditation Guidelines did have force and effect to the defendant. Thus, the first defendant have a duty to comply with the Accreditation Guidelines for the purpose of the First and second survey panel visits.

[34] We find no appealable error in the learned judge's findings that even though the Accreditation Guidelines do not have the force of law, but the breach of the guidelines by the defendants have legal consequences.

POWERS AND FUNCTIONS OF THE FIRST DEFENDANT UNDER ACT 679

[35] In assessing an application for accreditation, it is important to ascertain the scope and extent of the powers and functions of the first defendant, the JTC and the MQA under Act 679.

[36] The plaintiff's application on 2 December 2010 was made under sub-s 50(1) of Act 679. The application must comply with the requirements under sub-s 50(2). The MQA may, in consultation with the JTC, by virtue of

sub-s 50(4), require the plaintiff to provide additional documents and information.

[37] Added to that, for the purpose of considering an application to MQA under sub-s 50(1), any officer of the first defendant and the MQA may conduct an institutional audit. This is provided for in sub-s 52(3):

> The term 'institutional audit' is defined in section 2 to mean an evaluation of an institution, to determine whether it is achieving its mission and goals, to identify strengths and areas of concern and to enhance quality, which is carried out in accordance with the provisions of section 80.
>
> Section 80 provide for the establishment of institutional audit committee to perform such duties relating to institutional audit under Act 679.

[38] As required by sub-s 50(6), the MQA then referred the plaintiff's application to the JTC.

[39] The establishment of the JTC is provided for in s 51. In the context of medical programmes, as rightly pointed out by the learned judge, the JTC is established by the first defendant. The JTC must comprise of an officer of the MQA and such other persons as may be deemed necessary by the first defendant. These other persons are to be determined by the first defendant.

[40] According to PW4, during his tenure as the Director-General of Health ('DG') from the 5 March 2005 to 4 March 2011, and as the ex-officio President of the first defendant whilst holding the post of the DG in MOH pursuant to Act 50, the JTC comprised of five public agencies, ie the representatives of the first defendant, the Ministry of Health ('MOH'), the Ministry of Higher Education ('MOHE'), the MQA as well as the Public Service Department ('PSD'). The JTC itself was chaired by the president of the first defendant.

[41] The representative of the first defendant in the JTC at the material time was the second defendant.

[42] The purpose of the establishment of the JTC is spelt out in paras 51(1)(a) to (e) as reproduced below:

> (a) considering an application for accreditation under subsection 50(1);
>
> (b) making recommendations to grant or refuse the application for accreditation under subsection 52(1);
>
> (c) making recommendations for imposing conditions under section 54;
>
> (d) entering and conducting an institutional audit under subsection 52(3); and

A (e) making recommendations for the revocation of accreditation under section 55.

[43] After considering the recommendation of the JTC under s 51, sub-s 52(1) provides that the first defendant may:

B (a) approve the granting of accreditation; or

(b) refuse the granting of accreditation, stating the grounds for refusal.

This simply means that the JTC needs to deliberate and make C recommendations to the first defendant before the first defendant makes a decision whether to approve or refuse accreditation. It must be borne in mind that the JTC only makes recommendations to be considered by the first defendant. The first defendant however is not bound by the recommendations of the JTC. Be that as it may, it will be wrong in law for the first defendant to D make a decision to approve or refuse accreditation without going through the JTC. The law requires the first defendant to make a decision under sub-s 52(1) only after receiving recommendations from the JTC.

[44] Subsection 52(2) provides that when accreditation is granted under E para (1)(a), the MQA shall issue a certificate of accreditation to the provider of medical programme. Thus, it is clearly spelt out that the approval for accreditation is granted by the first defendant and not by the MQA as contended by the defendants. The MQA only issued the certificate of F accreditation.

[45] Section 53 makes provision for the certificate of accreditation referred to in sub-s 52(2). Subsection 53(1) provides that the certificate shall specify the professional programme and state the premises in which the professional G programme shall be conducted or facilitated.

[46] Section 54 provides for power by first defendant to impose such conditions as it may deem necessary or expedient upon the recommendations of the JTC at the time of or at any time after a certificate of accreditation has H been issued under sub-s 52(2). The first defendant may vary, amend or revoke any such conditions or impose new or additional conditions from time to time.

[47] Section 55 makes provision for the revocation of accreditation granted under para 52(1)(a). Subsection 55(1) provides that if the provider of medical I programme fails to comply with the framework or any part of it or breaches any condition for which the accreditation has been granted, the first defendant may, upon recommendation of the JTC at any time, withdraw the approval for accreditation that has been granted and consequent upon the withdrawal, the MQA shall revoke the certificate of accreditation.

[48] Before the revocation, the provider of medical programme shall be served a written notice of the intention to withdraw the approval by the MQA on the direction of the first defendant, specifying the grounds for such withdrawal and revocation under sub-s 55(2). By sub-s 55(3), the provider of medical programme is given opportunity to make representations within a stipulated time. After considering any representation made by the provider of medical programme upon the recommendations by the JTC, the first defendant shall issue a warning and give direction for the provider of medical programme to make rectification to the satisfaction of the first defendant within a specified period or proceed with the proposed action to withdraw the approval for accreditation. This is provided for in sub-s 55(4). Pursuant to sub-s 55(5), if the provider of medical programme fails to make the required rectification, upon the decision made by the first defendant to withdraw the approval for accreditation, the MQA then shall revoke the certificate of accreditation. Again, it is to be noted that the power to withdraw the accreditation is vested on the first defendant, not on the MQA. The MQA only revoke the accreditation, acting on the decision by the first defendant. Revocation is done by the MQA because the programme is registered with them under Act 679.

[49] The role of the MOHE is to register the institutions under Act 555. Thus, the cancelation of the medical programme comes under Act 679 while the deregistration of an institution comes under Act 555.

[50] It is obvious from the aforesaid provisions that the first defendant is the accrediting authority for the medical programmes. It is not the JTC or the MQA as contended by the defendants.

[51] That said, we disagreed with the first defendant's contention that the statutory responsibility for accreditation is the not final responsibility of the first defendant because the first defendant may, under s 51 of Act 679 delegate its authority to JTC for the said responsibility and that s 50 of Act 679 clearly states that accreditation responsibility is under the jurisdiction of the MQA.

[52] The defendant's interpretation of ss 50 and 51 on the delegation responsibilities is wholly erroneous as there is no delegation of such responsibilities as claimed. More importantly, the defendants had not taken into account s 52.

[53] In the circumstances, we reject the defendants' contention that the plaintiff had sued the wrong parties.

A THE LAW ON NEGLIGENCE

[54] In the context of exercising its power under sub-s 52(1), and as the law imposed an obligation for the first defendant to consider the recommendations by the JTC, we agree with the learned judge that the first defendant and its JTC must adhere to the criteria and procedures as set out in the Accreditation Guidelines as the guidelines set out the criteria and procedures to be followed in making the recommendations, the breach of which give rise to a right of recourse against the defendants by the plaintiff.

[55] It is trite law that in a claim for negligence, the plaintiff must establish the following. The existence of a duty of care owed to it by the defendant, there was a breach of that duty of care and that the breach had caused damage to the plaintiff and the damages claimed was not too remote in that it is a reasonably foreseeable consequence of the breach.

DUTY OF CARE

[56] With regard to the duty of care, the learned judge relied on the House of Lords case of *Caparo Industries Plc v Dickman* [1990] 2 AC 605 in holding that three ingredients must be fulfilled in order to establish the existence of a duty of care between the parties, namely: (a) the damage must have been reasonably foreseeable; (b) there must have been a relationship of proximity between the parties; and (c) it must be just, fair and reasonable to impose a duty of care on the defendant.

[57] *Caparo*, was adopted with approval by the Federal Court in *Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals* [2019] 2 MLJ 553; [2019] 2 MLRA 591.

[58] It is settled that a common law duty of care can arise in the performance of a statutory function. In the Federal Court case of *Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur v Poh Yang Hong* [2016] 6 MLJ 413 (FC), the respondent (plaintiff) entered into a sale and purchase agreement with the first appellant ('first defendant') to purchase a property ('property'). A private search at the second appellant's office ('second defendant') showed that the first defendant was the registered proprietor of the property. The memorandum of transfer and other documents to effect the transfer and charge of the property was presented to the second defendant's office for registration. Whilst registration was pending, the plaintiff found out that the property was in fact held under another description and was registered to one Mohamad Nor. The plaintiff conducted searches of the land title to the property at the second defendant's office again and the results showed that the land was registered in the name of the first defendant. However, it was also

discovered that the same land, but held under different title was registered under the name of Mohamad Nor. The plaintiff alleged that the second defendant breached their duty of care to the plaintiff by misrepresenting the true and actual particulars of the property. The plaintiff further alleged that the second defendant failed to maintain true and accurate records. The plaintiff relied on the information provided by the second defendant and as a result, suffered losses. On that premise, the plaintiff claimed damages in tort of negligence against the second and third defendants. The High Court gave judgment in favour of the plaintiff on his claim for damages premised on the tort of negligence and breach of statutory duty on the part of the second defendant. The Court of Appeal affirmed the decision of the High Court. Zulkefli Makinuddin CJ (Malaya) delivering judgment of the court held:

> [26] The indisputable fact is that the very same piece of land appears registered in the records of the second defendant under two different title numbers and two different names. This clearly points to the case of the failure on the part of the second defendant to ensure that the particulars of the register of title as maintained by the second defendant are accurate. As correctly noted by the High Court and the Court of Appeal this fact is the causa causan of the plaintiff's case against the second and the third defendants.
>
> ...
>
> [37] We would like to state here that a common law duty of care can arise in the performance of a statutory function. In the instant case, the second defendant had a statutory function to ensure that the records entered in the register of titles and maintained in the office of the second defendant contained particulars which are accurate. A failure of that duty can give rise to the co existence of statutory duty and common law duty of care (see the case of *X (minors) v Bedfordshire County Council*; *M (a minor) v Newham London Borough Council*; *E (a minor) v Dorset County Council* [1995] 3 WLR 152).

[59] Likewise, in the present case, the defendants has the duty to observe the Accreditation Guidelines in exercising its power under sub-s 52(1) of Act 679. The failure of that duty can give rise to the co-existence of common law duty of care.

[60] The defendants argued that the duty of care was not made out. The plaintiff had failed to show sufficient proximity of relationship between the first defendant and the plaintiff.

[61] PW4 explained what actually happened on the ground. He testified that all applications for accreditation of medical programmes will go to the JTC and the JTC will deliberate, look at the documents, it might appoint a panel to look at the documents to see everything is in order and if it is in order, then they will make recommendations to the first defendant. The first defendant will also deliberate, they may or may not agree with the JTC but if they agree with the

JTC, then they will endorse the programme and the applicant will then use that to apply for registration of the programme with the MQA and MOHE. We find that the evidence of PW4 is consistent with the law.

[62] In essence, there is sufficient relationship of proximity shown. As found by the learned judge, as between the second defendant and the plaintiff, the former was the chair of the survey panels on the two visits which formed the basis of the plaintiff's complaint. As the chair of the panel, the primary duty was upon the second defendant to ensure that the Accreditation Guidelines were adhered to, and the plaintiff was reliant upon the second defendant to ensure that the survey panel visit was conducted fairly and in accordance with the guidelines. As between the first defendant and the plaintiff, the first defendant was primarily responsible for the accreditation of medical degree courses in Malaysia, on the recommendation of the JTC. The plaintiff, as provider of medical programme would have to engage closely with the first defendant in order to obtain the necessary approvals.

[63] In respect of the damage must have been reasonably foreseeable, there was finding of facts by the learned judge that the second defendant had insisted on the attendance of the lecturers when the Accreditation Guidelines did not require the lecturers to be physically present at that point in time. The plaintiff had to bear huge costs in procuring the attendance of the lecturers. We have no reason to disturb the learned judge's finding.

[64] The learned judge was also correct in holding that the cost incurred by the plaintiff in preparing for the evaluation of MQA/PA1561 and MQA/PA1562 during the first survey panel visits would also have been foreseeable.

BREACH OF DUTY OF CARE BY THE DEFENDANTS THE FIRST SURVEY PANEL VISITS

[65] It is appropriate to appreciate the various visits to be made under the Accreditation Guidelines. PW4 explained them as follows:

> PW4 : Well if you look at the Accreditation Guidelines, there are several visits to be made. The first visit is a post-approval visit and this is a visit that is also sometimes called pre-enrolment visit where the panel which has been appointed by the JTC will make sure whether the institution is ready and has the capacity to conduct and sustain a medical programme. Once they are satisfied, they will report back to the JTC and say 'yes, this institution is ready to offer the programme' and this information will be relayed to the MMC. After that, there will be another visit, this is called the post-enrolment visit. This is six months after the first batch of students have been taken in to make sure everything is okay. And after that there will be another visit, the pre-clinical visit and yet another one, the post-clinical visit. So, there are several visits and finally there will be this visit which I mentioned just now

regarding the fact that they want to see whether this institution can be given a full accreditation, so this is the final visit before the first batch of students graduate. So there are visits like that but of course in between should there be any issues or concerns then the JTC has the power to appoint a panel to visit the institution and address those issues.

[66] As mentioned, the claim for negligence was based on the breach of the Accreditation Guidelines during to the first and the second survey panel visits.

[67] In respect of the first survey panel visits, the breaches alleged by the plaintiff were:

(a) failure to give the plaintiff the requisite four months' notice prior to the visit;

(b) the second defendant required the plaintiff to procure the attendance of the lecturers for the MQA/PA 0927; and

(c) failure to send the draft report of the survey panel visits to the plaintiff for the plaintiff's comment.

[68] We shall only deal with the breaches in paras (a) and (b).

FAILURE TO GIVE THE REQUISITE FOUR MONTHS' NOTICE PRIOR TO THE VISIT

[69] Appendix IV deals with Procedure Prior To The Accreditation Survey Visit. Part 1 relates to notification. In para 1(a) it states:

(a) In situation to be visited by Survey Team will be given at least FOUR MONTHS notice so that documentation can be adequately prepared. The notification is given by Technical Committee. The school will also be notified to prepare the database and institutional self-study.

[70] This was not done. The plaintiff was informed on 5 May 2011 of the visit to evaluate the MQA/PA 0927 on 13 May 2011 and 14 May 2011.

[71] The defendants contended that the four months notice as stipulated in para 1(a) above was only applicable for purposes of a full accreditation and not for monitoring visit such as the visits on 13 May 2011 and 14 May 2011 and that monitoring visits not subject to the Accreditation Guidelines. The plaintiff had obviously misconstrued para 1(a).

[72] The Accreditation Guidelines in our view, do not distinguish between a survey panel visits, monitoring visits and full accreditation visits. The evidence of PW4 confirmed that the Accreditation Guidelines did not speak about

A monitoring visits, monitoring panels and monitoring reports, and there was no such difference in the terminology used to describe the various visits as all such visits were part of the accreditation process.

B **[73]** Thus, the four months' notice is applicable to all visits for the accreditation of a medical programme.

[74] The four months' notice was to give the plaintiff to prepare their documentation adequately for the visit. This survey panel visit was the first post-approval visit for the MQA/PA 0927. PW4 said that all visits were C important but the first approval visit was extremely important, it was an important deciding factor, before one can subject the students to be undergoing a course in that particular institution. PW4 said that he complied with the four months' notice during his tenure as the president of the first defendant.

D

[75] There was also failure to give a four months' notice for the Second Survey Panel Visit on 29 to 30 April 2013. Notice was only issued on 22 April 2013.

E

[76] In the result, the non compliance of para 1(a) of Part 1 of the Accreditation Guidelines by the defendants had denied the plaintiff on both occasions adequate time to prepare for the visits. In both instances, the plaintiff was given barely one week to prepare for the visits.

F

THE PLAINTIFF REQUIRED TO PROCURE THE ATTENDANCE OF THE LECTURERS

[77] In gist, the plaintiff's pleaded case was that at the visit on 13 May 2011, G the second defendant insisted that the plaintiff must make the first year lecturers for the MQA/PA 0927 physically present to be interviewed by the panel. The plaintiff said this requirement was not notified to them at the coordination meeting on 11 May 2011. On the visit on 13 May 2013, the plaintiff informed the panel that as the 0927 programme was yet to be H approved to commence, there was no visa and permits because until such approval was obtained, the Immigration Department would refuse any application for such visa and permits. As the second defendant insisted on meeting the lecturers, the panel agreed to visit LC again on 27 May 2011.

I **[78]** The panel paid their visit on 27 May 2011. For that visit, the plaintiff had to incur expenses to employ lecturers for the 0927 programme.

[79] In the Accreditation Guidelines in Appendix I, para 5 titled Teaching/Academic Staff, under subtitle The Staff: Student Ratio, stated, inter

alia, the following:

> For a school that is starting a new programme, there should be sufficient academic staff to support the first (TWO) years of the programme. The school must have a proper plan for the progressive recruitment of qualified staff.

[80] There is nothing in the passage above which requires new medical schools to make physically available teaching staff during post approval visit. PW1 testified that it was never the practice to require a medical school to employ teaching staff during the first post-approval visit, and it was only after the course has commenced that the school would have to engage teachers and lecturers. PW4 further confirmed that there was no such requirement in the Accreditation Guidelines for the new medical school to employ a full set of lecturers and present them to the survey panel for assessment during a post approval visit, suffice if a list of lecturers is given by the school.

[81] The learned judge held that it was indisputable that the plaintiff did subsequently procure the presence of the lecturers on 27 May 2011 and had incurred significant expense in so doing. The second defendant in fact admitted that he had interviewed the lecturers present on 27 May 2011.

[82] The learned judge had, in our view, analysed and appropriately dealt with the evidence on what had taken place during the First Survey Panel Visit and came to his finding of facts that the second defendant had indeed required the plaintiff to make its proposed lecturers available for interview on 27 May 2011. In rejecting DW11's evidence, who supported the second defendant's evidence that there was no communication of such requirement to the plaintiff, the learned judge had obviously taken into account DW11's admission that he was not present for the revisit on 27 May 2011 and that he was not aware of the reason for the revisit.

[83] We reminded ourselves of the reminder by the Federal Court in *Ng Hooi Kui*, which we had alluded to earlier. Quite clearly, the outcome of this issues turned primarily on findings of fact. In our view, based on the evidence led during the trial, it cannot be said that the learned judge's conclusion upon the evidence was plainly wrong. In our view, having considered all evidence, the learned judge was entitled to reach his evaluative judgment. We do not find his reasonings flawed or his conclusion wrong.

[84] Undoubtedly, the imposition of the requirement for lecturers to be present at this first visit was a breach of the duty of care owed by the second respondent to the plaintiff.

A THE SECOND SURVEY PANEL VISIT

Failure to evaluate MQA/PA 1561 and MQA/PA1562

B **[85]** MQA/PA 1561 and MQA/PA 1562 and another offshore programme of the plaintiff MQA/PA 1049, were granted provisional accreditation by the MQA on 8 February 2012. However, as observed by the learned judge, over the course of the next few months, modifications were made to the curricula of the three offshore programmes, culminating in an application from the plaintiff on C 2 January 2013 to conduct two of the three offshores programmes entirely in Malaysia, namely MQA/PA 1561 and MQA/PA 1562. Excerpts of the said letter showed:

> 3. Lincoln University College memohon agar program Doctor of Medicine (MD) (Offshore Campus Ivano-Frankivsk National Medical University , Ukraine) D (MQA/PA 1561) dilaksanakan sepenuhnya di Malaysia.
>
> 4. Lincoln University College akan menjalankan fasa praklinikal dua tahun di kampusnya di Mayang Plaza, Petaling Jaya dan fasa klinikal 3 tahun di Hospital Raja Perempuan Zainab II, Kota Bahru, Kelantan. Program Perubatan tiada halangan untuk membenarkan pelajar perubatan Kolej University Lincoln E menggunakan Hospital Raja Perempuan Zainab II,
>
> Kota Bahru, Kelantan menggunakan Hospital Raja Perempuan Zainab II, Kota Bahru, Kelantan untuk tujuan pembelajaran dan latihan praktikal. Surat Timbalan Ketua Pengarah Kesihatan (Perubatan) bil. KKM/87/P2-1/36-345(11) bertarikh 7 September 2012 dilampirkan (Lampiran D).
>
> F
>
> 5. Lincoln University Colllege memohon pertimbangan Y.Bhg Datuk agar dapat meluluskan permohonan Lincoln University College untuk menjalankan program perubatan ini secara sepenuh masa di Malaysia.

G **[86]** A similar letter of even date was written in respect of MQA/PA 1562 where MQA/PA 1562 would utilise Hospital Duchess of Kent, Sandakan.

[87] The JTC at its meeting on 8 January 2013 approved the plaintiff's application to conduct MAQ/PA 5161 and MQA/PA 1562 in Malaysia, and H decided that there should be a prior survey panel visit. The minutes showed:

> 8.2 LINCOLN UNIVERSITY COLLEGE PERMOHONAN PELAKSANAAN PROGRAM PERUBATAN DOCTOR OF MEDICINE (MD) SEPENUHNYA DI MALAYSIA
>
> I Mesyuarat dimaklumkan:
>
> a. MPM telah menerima permohonan daripada Lincoln University College (LUC) untuk melaksanakan program-program perubatan berikut sepenuh masa di Malaysia:
>
> Doctor of Medicine (MD) (Offshore Campus Ivano- Frankivsk National

Medical University, Ukraine)(MQA/PA1561); dan

Doctor of Medicine (MD) (Offshore Campus Danylo Halytsky Lviv National Medical University, Ukraine)(MQA/PA1562).

b. Kelulusan asal kedua-duan program tersebut adalah untuk mengguna pakai kurikulum Doctor of Medicine (MD) lima tahun Lincoln University College secara dua tahun fasa pra klinikal di Malaysia dan tiga tahun fasa klinikal di Ukraine.

c. Pihak LUC telah dinasihatkan untuk menjalankan kesemua program sepenuhnya di Malaysia.

d. LUC juga telah mendapat kebenaran oleh KKM untuk menggunapakai Hospital Sandakan dan Hospital Raja Perempuan Zainab II bagi kedua-dua program tersebut.

Mesyuarat mengambil maklum dan bersetuju:

a. Meluluskan kedua-dua program tersebut sebagai program MD (tempatan).

b. Namun sebelum setiap program dimulakan, suatu lawatan perlu diadakan terlebih dahulu ke kampus dan fasiliti LUC di Malaysia bagi menentukan kesesuaian serta jumlah kuota pelajar yang boleh diambil oleh LUC bagi setiap program tersebut.'

[88] The first defendant approved the plaintiff's application in a letter dated 5 February 2013 to LUC where it stated the following:

2. Dimaklumkan bahawa permohonan Lincoln University College bagi pelaksanaan program perubatan Doctor of Medicine (MD) (Offshore Campus Ivano-Frankivsk National Medical University, Ukraine) sepenuhnya di Malaysia telah dibentangkan di Mesyuarat Jawatankuasa Teknikal Pengiktirafan Pengajian Perubatan (JTPPP) pada 8 Januari 2013 lepas.

3. JTPPP juga telah mengambil maklum bahawa Kementerian Kesihatan Malaysia telah membenarkan LUC menggunakan Hospital Raja Perempuan Zainab I, Kota Bahru, KeIantan untuk tujuan pembelajaran dan latihan praktikal program tersebut.

4. Sukacita dimaklumkan, JTPPP telah bersetuju meluluskan program LUC tersebut sebagai program MD (tempatan). Walau bagaimanapun, sebelum program tersebut dimulakan, suatu lawatan perlu diadakan untuk menilai kampus dan fasiliti berkaitan yang akan dimanfaatkan didalam peyampaian program tersebut bagi menentukan kesesuaian pelaksanaan program, serta kuota pelajar yang dibenarkan.

5. Keputusan tersebut telah diperakukan oleh Majlis Perubatan Malaysia semasa mesyuarat kali ke 312 yang diadakan pada 15 Januari 2013 lalu.

[89] A similar letter of even date was written in respect of MQA/PA 1562 where MQA/PA 1562 would utilise Hospital Duchess of Kent, Sandakan.

[90] The nature of the approvals cannot be a matter of dispute as the two letters stated explicitly that the first defendant had endorsed the JTC's approvals 'meluluskan program LUC tersebut sebagai program MD (tempatan)' and that MQA/PA 1561 and MQA/PA 1562 were to utilize Hospital Kota Bharu and Hospital Sandakan respectively. In clear terms, MQA/PA 1561 and MQA/PA 1562 were converted into two separate local programmes.

[91] Consistent with the conditions imposed by the JTC and as endorsed by the first defendant that there would be an assessment panel visit, PW8, an officer from the MQA issued to the second defendant and other members of the panel email dated 19 April 2013 titled 'Lawatan Pemantauan Akreditasi Sementara Program-Program Perubatan (MQA/PA 0927, MQA/PA 1561 Dan MQA/PA 1562) Di Lincoln University College (LUC), Petaling Jaya , Selangor'. It was clearly spelt out in the said email that the visit scheduled on 29 and 30 April 2013 was 'satu lawatan pemantauan akreditasi sementara program-program Perubatan yang dikendalikan oleh Lincoln University College ('LUC')'.

[92] On 22 April 2013, the MQA issued a notice to the plaintiff informing it that a Second Survey Panel Visit would be held on 29 and 30 April 2013 to monitor the provisional accreditation of three medical degree programmes, ie MQA/PA 0927, MQA/PA 1561 and MQA/PA 1562.

[93] It is indisputable that there was no evaluation of the MQA/PA 1561 and MQA/PA 1562 during the Second Survey Panel Visit. The Survey Panel Report prepared for the purpose of the second survey panel visits showed that the second defendant conducted the visit but did not evaluate the two offshore programmes.

[94] The plaintiff contended that the panel chaired by the second defendant which refused to evaluate MQA/PA 1561 and MQA/PA 1562 was in breach of para 5 of the Accreditation Guidelines.

[95] Paragraph 5 of the Accreditation Guidelines states, inter alia:

> It is noted that few medical schools are offering more than one programme. For the purpose of accreditation exercise, each programme should be considered to be on its own merit and independent from one another.

[96] The defendants' stance was that the second defendant's refusal to evaluate the MQA/PA 1561 and MQA/PA 1562 during that visit was because the two offshore programmes MQA/PA 1561 and MQA/PA 1562 were absorbed into the local programme MQA/PA 0927.

[97] The plaintiff pointed out that there was no such absorption as the MQA/PA 1561 and MQA/PA 1562 were converted into two local programmes subject to survey visit and the notice issued by the MQA dated 22 April 2013 clearly stated that the second defendant would evaluate both the local programme MQA/PA 0927 and the offshore programmes MQA/PA 1561 and MQA/PA 1562.

[98] The learned judge dealt with the dispute as to whether there was absorption of MQA/PA 1561 and MQA/1562 into the MQA/PA 0927 or was there a conversion of the two offshore programmed into local programmes. His Lordship found that based on what was communicated between the plaintiff and the first defendant, the MQA/PA 1561 and MQA/PA 1562 offshore programmes were in fact converted into two local medical degree programmes. We agree.

[99] The second defendant's refusal to evaluate the MQA/PA 1561 and MQA/PA 1562 during the second survey panel visits was contrary to the letters issued by the first defendant on 5 February 2013 and the notice issued by the MQA on 22 April 2013. From the documentary evidence referred to earlier, there was no mention of absorption into the MQA/PA 0927. The correspondences between the parties unequivocally established that the plaintiff had been told that the MQA/PA 1561 and MQA/PA 1562 were approved as local medical degree programmes. The absorption issue has no basis and must be rejected. There was a clear breach by the second defendant in refusing to evaluate the MQA/PA 1561 and the MQA 1562.

[100] The defendants however appeared to have abandoned the absorption issue and gave other reasons as to why evaluation of MQA/PA 1561 and MQA/PA 1562 were not conducted during the second survey panel visits. The defendants' case is this.

[101] The second defendant sought instruction from the first defendant during the first defendant's meeting on 16 April 2013 and he was told by the first defendant to review MQA/PA 0927 to make sure it was well established before considering any additional intake from the newly converted programmes MQA/PA 1561 and MQA/PA 1562.

[102] The JTC had decided on 1 April 2011 that the offshore programmes could only commenced after the local programme had 'berjalan lancar',

meaning to say after the local programme had graduated its first cohort of students. Learned counsel for the defendants submitted that DW3 who was the chairman of JTC meeting had confirmed this fact and his evidence should be given more weight and should be preferred.

[103] The defendants further contended that the panel had found that the plaintiff had not fully consolidated the curriculum and management of its MQA/PA 0927. In view thereof, the defendants contended that the second defendant did not deliberately refuse to assess the newly converted programmes MQA/PA 1561 and MQA/PA 1562 as alleged by the plaintiff. He merely conducted himself in accordance with the instruction of the first defendant to ensure that MQA/PA 0927 was first effectively carried out before the MQA/PA 1561 and MQA/PA 1562 commenced. The second defendant's conduct was not in contradiction with the decision of the first defendant and JTC on 8 January 2013 and 15 January 2013. The conduct of the second defendant therefore has not in any way caused any breach of the duty of care on the part of the first defendant towards the plaintiff, if any. Therefore, there was no refusal by the first or second defendants to evaluate the offshore programmes.

[104] We find the reasons given by the defendants for the non-valuation are untenable for the following reasons.

[105] The email dated 19 April 2013 from PW8 to the second defendant clearly stated that the evaluation to be conducted was with respect to the three programmes mentioned therein.

[106] The second defendant's email to PW8 was to inform her that the time allocated for the visit ie two days was not adequate for the panel to assess the three programmes and suggested that MQA to arrange a separate visit for MQA/PA 1561 and MQA/PA 1562 or another visit by a different team. By this email, the second defendant had acknowledged to MQA that he had to evaluate the MQA/PA 0927, MQA/PA 1561 and MQA/PA 1562 but complained about the inadequacy of time. He wrote 'Saya tak mahu buat lawatan dan menilai program dengan tergesa-gesa bagi mengelakkan berlakunya keputusan yang boleh dipertikaikan oleh ahli MMC'. It matters not that the second defendant received no response from PW8. The point is he knew well that there was no absorption of the offshore programmes. The absorption issue is in our view an afterthought.

[107] The first defendant's minutes dated 16 April 2013 showed at para 6.8 the following:

6.8 STATUS TERKINI LINCOLN UNIVERSITY COLLEGE (LUC)

Majlis dimaklumkan:

a. Pihak LUC ada memohon untuk menyerapkan program-program offshore di Ukraine kepada program tempatan.

b. Pada Mesyuarat Jawatan kuasa Teknikal Pengiktirafan Program Perubatan (JTPPP) bil 1/2013 yang bertarikh: 8 Januari 2013, permohonan LUC diluluskan untuk menyerapkan program-program offshore ini kepada program tempatan. Suatu lawatan akan dijalankan untuk menetapkan jumah kuota yang dibenarkan kepada pihak LUC.

c. Prof. Dato Dr. Wan Mohammad Wan Bebakar ingin mendapatkan kepastian samada LUC akan menjalankan hanya satu program tempatan ataupun tiga program tempatan yang berbeza selepas mendapat kebenaran JTPPP menyerapkan program offshore mereka ke dalam program tempatan.

Majlis mengambil maklum dan bersetuju:

a. LUC hanya menjalankan satu program tempatan sahaja. Program-program offshore mereka diserapkan ke dalam program tempatan yang sedia ada bukan sebagai program tempatan yang baru.

b. Keputusan kuota hanya boleh ditentukan selepas suatu lawatan pemantauan diadakan kelak.

[108] It is to be noted that the minutes made no reference to the letter dated 1 April 2011. What had actually led to the first defendant departing from its earlier decision as reflected in the letter dated 5 February 2013 was dealt with by the learned judge who found that the second defendant was responsible for re-designating the conversion of those programmes into MQA/PA 0927. The learned judge held:

> 47. The sequence of events was explained by Dr Wan Mazlan bin Mohamad Woojdy (PWS), the then MMC secretary11. On 11 April 2013, the MQA had written an e-mail to the MMC to inform it of a scheduled survey panel visit and empanelling the four doctors. Upon receipt of this email, Dr Wan Mazlan wrote back the following day, copying (among others) the members of the survey panel, informing that there were in fact three programmes to be evaluated. Some hours later, the second defendant then wrote to the MQA officer, copying Dr Wan Mazlan, stating that there was inadequate time to review three programmes. On Sunday, 14 April 2013, Dr Wan Mazlan suggested a meeting on Tuesday morning, 16 April 2013, in order to resolve the issue.
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> 48. This meeting went ahead on 16 April 2013, chaired by the second defendant. No MQA officers were present, due to the short notice. Dr Wan Mazlan explained what had gone on in the meeting in the following terms:
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> > What was discussed in the meeting according to the Chairman [the second defendant], he said no, we are supposed to visit only one programme because the two programmes had been absorbed. So because of that, we have got to visit only one programme.

A 49. Dr Wan Mazlan attempted to explain to the second defendant that there had been no absorption based on the previous minutes of the JTC and the MMC. He even confirmed with the MQA after the meeting that there were three extant local programmes approved for the plaintiff. The issue of absorption, according to Dr Wan Mazlan, had never arisen before. It arose only that morning of 16 April 2013.

B 50. That very afternoon, the second defendant informed the meeting of the MMC that the two programmes had been absorbed into MQA/PA 0927. According to Dr Wan Mazlan, the MMC meeting arrived at the conclusion that there was just one single programme and that the other two had been absorbed into MQA/PA 0927 because they were told so by the second defendant. Dr Wan Mazlan testified that he C felt bullied by some of the members of the council by the fact that he was not allowed to speak and would be cut off. He also felt that his future career prospects would suffer if he was too outspoken. Nonetheless, he attempted to explain to the council that there were three programmes and no absorption but his views were not taken into account.

D 51. The MQA was never informed of the unilateral decision by the second defendant to regard the converted programmes MQA/PA 1561 and MQA/PA 1562 as having been absorbed into MQA/PA 0927. This was the reason why, when the MQA wrote to the plaintiff on 22 April 2013, the plaintiff was informed that all three local programmes were to be assessed by the survey panel.

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[109] In any event, the minutes of the JTC's meeting of 1 April 2011 merely stated that the OP 'boleh dimulakan apabila program tempatan LUC telah berjalan lancar'. The words 'berjalan lancar' are not defined. Thus, it is open to F interpretation. PW7 who attended the JTC's meeting on 1 April 2011 explained that the words 'berjalan lancar' simply mean that the offshores programmes could commence after the local programme had an intake of students. In this regard, MQA/PA 0927 had commenced on 19 December 2011.

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[110] It is also noteworthy that the words 'berjalan lancar', are not mentioned in the letter dated 22 April 2013. The letter merely stated that LUC need to establish their local programme before simultaneously enrolling students in collaboration with their foreign partners. There was no condition for H evaluation of the offshore programmes by the survey panel that the first cohort of students must graduate.

[111] We find the learned judge's findings are reasonably explained and justified based on material facts presented before the court. The prior decisions I of the JTC and the first defendant clearly showed that MQA/PA 1561 and MQA/PA 1562 were converted into two separate local medical programmes. Thus, his findings ought not to be disturbed (see *Ng Hoo Kui*).

CAUSATION

[112] It is settled law that if there is a breach of duty of care, before there can be liability, the plaintiff must prove that the breach by the defendants have caused the loss or damage complained of. There must be a link between the wrongdoing and the damage caused (see *Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 2 MLJ 1; *Bonnington Castings v Wardlaw* [1956] AC 613).

[113] Thus, there must be evidence as to causation. It is a question of fact whether the conduct of the defendants had caused the damage.

[114] On the facts of this case, the learned judge had rightly found that the plaintiff would not have incurred the costs of the procuring the attendance of the lecturers for the pre-enrolment survey visits but for the insistence of the second defendant that they be present.

REMOTENESS OF DAMAGE

[115] We had canvassed this issue that the damage suffered by the plaintiff was reasonably foreseeable at the time the acts complained of were carried out, and we do not intend to repeat. We affirm the learned judge's findings that because the losses suffered by the plaintiff arose directly as a consequence of actions of the second defendant, there was no question of the damages being too remote.

VICARIOUS LIABILITY

[116] Learned counsel for the defendants cited the Federal Court case of *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685; [2017] 10 CLJ 529 to support the defendants' contention that the relationship between the first and second defendants is not akin to employment so as to give rise to vicarious liability for the second defendant's tortious act (which they denied). The second defendant was at all material times a member of the first defendant nominated pursuant to s 3 of Act 50 and he was a representative of the first defendant for the two survey visits. He did not draw any salary or allowance from the first defendant and neither did he at all material times have a contract of employment with the first defendant.

[117] It was further submitted that, in the event this court finds that there is such a relationship of employment or akin to employment between the first and second defendants, the second defendant had not committed any acts and/or omissions before, in the course of and after the First and second survey panel visits. The second defendant had merely conducted himself in accordance with the instruction of the first defendant.

[118] The learned judge relied on the Federal Court case of *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281 on the test for imposing vicarious liability on the first defendant for the tortious act of the second defendant.

[119] We find no reason to disturb the learned judge's findings of facts that the first defendant was vicariously liable for the acts attributed to the second defendant, as the second defendant was an agent of the first defendant when he conducted the Survey Panel Visits. The second defendant was directly under the control of the first defendant in so far as it concerned the two visits and the negligence took place while the second defendant was conducting the visits as instructed by the first defendant.

[120] In the result, the learned judge correctly found that all the elements of negligence had been proven against the defendants.

BREACH OF STATUTORY DUTIES

[121] We have earlier discussed the statutory duties of the first defendant under Act 679. As regards Act 50, essentially the function of the first defendant under sub-s 12(2) of Act 50 is to advise the Minister from time to time on the addition to, deletion from or amendment to the Second Schedule.

[122] As abovementioned, we are in agreement with the learned judge that where it is established that the substantive provisions of the Accreditation Guidelines have not been adhered to, such an act will amount to a breach by the first defendant of its duties under s 52 of Act 679 to properly evaluate the recommendations of the JTC and to exercise its powers and discretions in accordance with the law.

[123] We will go further to say that quite apart from the breach of the Accreditation Guidelines, the first defendant was also in breach of its statutory duties under s 52 of Act 679.

[124] Prior decisions of the JTC and the first defendant clearly showed that MQA/PA 1561 and MQA/PA 1562 were converted into two separate local medical programmes. The JTC at its meeting on 8 January 2013 approved the plaintiff's application to conduct MAQ/PA 5161 and MQA/PA 1562 in Malaysia subject to prior survey panel visit. This was done in accordance with s 51. The recommendation was the considered by the first defendant. The first defendant had endorsed the JTC's approval on 15 January 2013 and gave approval to the plaintiff by a letter dated 5 February 2013. This was done pursuant to s 52.

[125] In our view, when approvals have been given by the first defendant by its letter dated 5 February 2013 for the plaintiff to start MQA/PA1561 and MQA/PA 1562 as local programmes subject to the visit, and as the letter dated 5 February 2013 was not retracted and nothing in the minutes of meetings of the first defendant on 16 April 2013 showed that the approvals were withdrawn, the approvals triggered the application of Act 679 where the JTC has to make its recommendation under s 51, after the panel visits, and for the first defendant to decide whether to approve or refuse accreditation under s 52, after considering the JTC's recommendations.

[126] We are of the view that the first defendant cannot make its decision as it did, on 16 April 2013 based on the representation by the second defendant and not based on recommendation by the JTC. There was no evidence to show that the decision made on 16 April 2013 was premised on the recommendation by the JTC. The first defendant's act of endorsing the second defendant's re-designating the conversion of MQA/PA 1561 and MQA/PA1562 into MQA/PA 0927 which eventually led to the non- evaluation of the MQA/PA 1561 and MQA/PA 1562 by reason of the refusal of the second defendant to conduct the same, and in the result there was no recommendation from the JTC for the first defendant to act upon in making a decision under s 52, is not in accordance with the law. The first defendant had exceeded its legal limits in making the decision 'LUC hanya menjalankan satu program tempatan sahaja. Program-program offshore mereka diserapkan ke dalam program tempatan yang sedia ada bukan sebagai program tempatan yang baru', effectively refusing to consider accreditation of the offshores programmes, without any recommendation from the JTC. It is essential that the first defendant must be compelled to observe the law and should be kept in its place (*Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135).

[127] In the circumstances, there is a clear breach of statutory duties by the first and second defendants where by their actions and/or omissions, the two offshore programmes were not evaluated.

[128] Learned counsel for the plaintiff submitted that a breach of statutory duty per se does not ipso facto give rise to a private law cause of action. In *X Minors v Bedfordshire County Council* [1995] 2 AC 633, the headnote showed the following:

> The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the

protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: see *Cutler v Wandsworth Stadium Ltd* [1949] 1 All ER 544; [1949] AC 398 and *Lonrho Ltd v Shell Petroleum Co Ltd* [1981] 2 All ER 456; [1982] AC 173.

[129] We have considered the learned judge's findings that the plaintiff could commence a private law action against the first defendant for breaches of the Accreditation Guidelines and its statutory duties (see paras 71–77 of the GOJ). We do not think that there is any appealable error that warrants intervention.

MISFEASANCE IN PUBLIC OFFICE

[130] The Federal Court in *Tony Pua v Government of Malaysia* [2019] 12 MLJ 1 adopted the House of Lord case of *Three Rivers District Council and others v Bank of England (No 3)* [2000] 3 All ER 1.

[131] In *Three Rivers*, the ingredients of the tort of misfeasance in public office as described by Lord Steyn are as follows:

(a) the defendant must be a public officer;

(b) there must have been an exercise of power as a public officer;

(c) concerns the state of mind of the defendant;

(d) duty owed by the defendant to the plaintiff;

(e) causation; and

(f) damages and remoteness.

PUBLIC OFFICER

[132] It is indisputable that the second defendant is a public officer by virtue of s 109 of Act 679. This question only relate to the first defendant.

[133] On the issue of whether the first defendant is public officer, the defendants relied on the decision of the High Court in *Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2017] 9 MLJ 1.

[134] In *Dr Mahathir*'s case, Dr Mahathir and two others sued Datuk Seri Najib Razak ('Najib Razak') in his capacity as the then Prime Minister of Malaysia, the Minister of Finance and the Chairman of the Board of Advisors of 1MDB. The plaintiffs' causes of action were premised on:

(a) the tort of misfeasance in public office; and/or

(b) breach of fiduciary duties in public office.

[135] Najib Razak applied to strike out the suit on the contention that he was not a public officer. The High Court found that Najib Razak was not a public officer, allowed his application and the action was thus struck out. The Court of Appeal dismissed the appeal by Dr Mahathir. Leave to appeal to the Federal Court was dismissed.

[136] As to whether the plaintiff had satisfied the first element for tort of misfeasance in public office against the first defendant, we refer to the following excerpt from *Tony Pua*:

> [82] Thus, in *Henly v Lyme Corporation*, a civil action may be brought against a corporation entrusted with the public duty of repairing a cob for failing to do so. In *Jones v Swansea City Council*, a local council which refused to allow a change of user of premises leased to an individual was susceptible to a claim in misfeasance of public office, even though the immediate origin of the power was in contract. In *Dunlop v Woollahra Municipal Council* [1982] AC 158, the defendant council as a statutory corporation exercising governmental functions was regarded as a 'public officer' for the purposes of the tort. In the case of *Three Rivers* itself, it was accepted that the Bank of England, with the principal responsibility of supervising banking activities in the UK, constituted a 'public officer' for the purposes of an action for misfeasance.

[137] Thus the members of the first defendant would be regarded as public officers for the purposes of the tort of misfeasance in public office. Sections 5 and 6 of Act 50 and ss 109 and 110 of Act 679 recognised the members of the first defendant as public servants/public officers in the discharge of their duties as members.

[138] The defendants had attempted to distinguish *Tony Pua* from *Dr Mahathir*. We think the argument is not tenable. In *Tony Pua*, the Federal Court had examined the decisions of both the High Court and the Court of Appeal in *Mahathir*'s case and the laws. In clear terms, the Federal Court stated that the court was not convinced by the reasonings of the Court of Appeal in the *Dr Mahathir*'s case. The Federal Court ruled:

> [154] Based on the factual matrix and the law that we have set out in extenso above, we are of the view that it is clear that Najib Razak, the then Prime Minister of the country falls within the ambit of a 'person holding public office' or a 'public officer'

A as envisaged under the common law tort of misfeasance in public office. We are, with respect, unconvinced by the reasonings of the Court of Appeal in the Mahathir case. The legal rationale and hence the result reached was, again with greatest of respect, erroneous. We are unable to comprehend why the development of the Malaysian common law should be stultified to exclude such bearers of public office B from the full reach of the law.

[139] We noted that learned judge disagreed with the findings of the High Court in *Dr Mahathir* and that at the time the learned judge wrote his GOJ, the appeal in *Dr Mahathir* was pending before the Court of Appeal.

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[140] With respect to the defendants' argument that the learned judge had made a contradictory judgment on the position of the first defendant in the earlier Asia Pacific Higher Learning as reported in *Asia Pacific Higher Learning Sdn Bhd v Majlis Perubatan Malaysia & Ors and another suit* [2017] MLJU D 1038; [2017] 1 LNS 1014, we agree with learned counsel for the plaintiff that that case which was decided before the *Tony Pua*, is also no longer applicable in respect of the definition of a 'public officer' for the purpose of the tort of misfeasance in public office. *Tony Pua* states the current law on the subject E matter and it is binding on this court.

[141] It follows that there is no issue in the second element, the conduct of the first and second defendants involved the exercise of power as a public officer or the exercise of public functions.

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[142] The third element pertains to the state of mind of the defendants. On this point, the House of Lords in *Three Rivers* held at p 8 that targeted malice could be satisfied if it is shown that the conduct complained of was exercised in bad faith and for an improper motive:

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> The case law reveals two different forms of liability for misfeasance in public office. First there is the case of targeted malice by a public officer, ie conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act H complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.

[143] The learned judge had in this instance, reasoned out his findings based on his evaluation of evidence presented before him to hold that there was I targeted malice on the part of the second defendant in the conduct of the first and second survey panel visits. This can be seen in the GOJ in paras 113–120. Based on the facts, we do not think the learned judge was plainly wrong in saying that the second defendant's arbitrary conduct for requiring the lecturers to be physically present during the first survey panel visits, was in bad faith and

motivated by an improper purpose. He as the chair would have known that at the material time when the programmes had not been approved, his insistence was burdensome and would have put the plaintiff to tremendous expense because the plaintiff would have to deal with the immigration problems, to say the least. Another instance was the defendant's representations during the first defendant's meeting on 16 April 2013 that MQA/PA 1561 and MQA/PA 1562 were absorbed into MQA/PA 0927 rather than converted into separate local medical programmes, and consequently the first defendant's decision to that effect. The learned judge found that the second defendant was responsible for re-designating the conversion of those programmes into MQA/PA0927.

[144] We are of the view that the learned judge did not err in his findings that there was targeted malice on the part of the second defendant in the conduct of the first and second survey panel visits as there was no credible explanation of a proper motive provided by the second defendant for his very actions. The defendants' denial of targeted malice must be rejected.

DUTY OWED TO THE PLAINTIFF

[145] In this case, duty of care in negligence has been established. In *Three Rivers*, Lord Steyn said that that 'any plaintiff must have a sufficient interest to found a legal standing to sue'. We had earlier affirmed the learned judge's finding on the duty of care owed to the plaintiff. Similarly, there also exist a duty sufficient to found the basis of the tort of misfeasance in public office.

CAUSATION

[146] We have also discussed the loss suffered by the plaintiff as a result of the second defendant's action in insisting on the physical presence of the lectures and also in refusing to evaluate the MQA/PA 1561 and MQA/PA 1562. The loss suffered meets the requirement of causation in this tort.

REMOTENESS

[147] The second would have foresaw that losses to the plaintiff by his actions during the First and second survey panel visits. Hence, the damages suffered cannot be too remote.

[148] In *Three Rivers*, it was held that the principles of vicarious liability apply as much to misfeasance in public office as they do in respect of other fault-based torts. We affirm the decision of the learned judge in finding the first defendant vicariously liable to the plaintiff for the acts of the second defendant in relation to the tort of misfeasance in public office.

A SECTION 110 OF ACT 679 AND 2 OF ACT 198

[149] We proceed to consider whether the acts or omissions of the first and second defendants were done in good faith so as to entitle either one or both of them to protection under s 110 of Act 679 and s 2 of Act 198 against the plaintiff's claims for negligence.

[150] Section 110 of the MQA Act 679 reads:

110 Protection against suit and legal proceedings

No action shall lie or prosecution shall eb brought, instituted or maintained against —

(a) the Agency, any member of its committees or any officer, employee or agent of the agency;

(b) the Council, any member of the Council, or any member of its committees: or

(c) the Joint Technical Committee or any of its member; or

(d) any person lawfully acting on behalf of the Agency or the Council,

in respect of any act, neglect or default done or committed by him or it in good faith or any omission omitted by him or it in good faith in such capacity.

SECTION 2 OF ACT 198

[151] Section 2 of Act 198 reads:

Where, after the coming into force of this Act, any suit, action, prosecution or other proceedings is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect —

(a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

[152] The defendants contended that s 2 of Act 198 and s 110 of Act 679 accorded protection to the first and second defendants from litigation as all acts were done in good faith in such capacity. The burden is on the plaintiff to prove bad faith, and this case the plaintiff failed to do so (reliance was made to *Selvakumar a/l Subramaniam v Penguasa Pusat Pemulihan Akhlak, Simpang Renggam, Johor Darul Takzim & Ors* [2014] 7 MLJ 244; [2013] 1 LNS 1068). Thus, the defendants are presumed to have acted in good faith and are therefore accorded protection under the Acts.

[153] We are unable to agree. Section 110 of Act 679 and s 2 of Act 198 provide protection in respect of acts or omissions in good faith. In the present case, the learned judge found that the plaintiff's contention of malice has been made out. The second defendant cannot seek protection under the said provisions because he had not acted in good faith. In so far as it concern the first defendant, s 5 of Act 50 provides that Act 198 shall apply to any action or suit against it or its member, officers, servant or agents. We however state that the first defendant cannot rely on s 5 of Act 50 as the first defendant had exceeded its legal limits in making its decision on 16 April 2013.

THE PLAINTIFF'S SUIT IS PREMATURE?

[154] The defendants argued that the plaintiff's suit is premature and therefore unsustainable as the plaintiff did not resort to the appeal procedures prescribed under s 82 of Act 679. We disagree because the subject matter of the instant dispute are the defendants' breaches of the Accreditation Guidelines during the First and second survey panel visits and the dispute did not concern the refusal to grant or revocation of accreditation its medical programmes. Thus, the plaintiff was not required to resort to s 82 of Act 679.

COSTS AWARDED BY THE HIGH COURT

[155] The learned judge awarded the plaintiff costs of RM250,000. The defendants submitted that the costs was manifestly excessive and punitive in nature. We accept that costs are always at the discretion of the court. We have considered the submissions by both parties. We do not think that we should interfere with the High Court's order on the sum awarded.

CONCLUSION

[156] We dismiss the appeal with costs and affirm the order of the High Court.

Appeal dismissed with costs.

Reported by Nabilah Syahida Abdullah Salleh